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DISPUTE RESOLUTION AS AN ALTERNATIVE TO THE ORDINARY COURTS IN MADAGASCAR: A GUIDE TO CHOICE TN THE INTERNATIONAL ARENA

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I. INTRODUCTION

The underlying problem which motivates the study of methods of alternative dispute resolution which might be applicable in Madagascar is the fact that its judicial system is currently ineffectual and unreliable. The overriding interest involved in the pursuit of such a subject is the interest in fostering the confidence of investors, both foreign and domestic, by either bolstering the judicial system or identifying immediately available alternatives in the commercial arena which will inspire the kind of trust necessary to the encouragement of investment and the promotion of the private sector. This study will therefore make recommendations. where appropriate, for the bolstering of the judicial system and will focus on identifying those effective alternatives which arc currently available to investors in that country.

In the ideal, in order to accomplish the goals identified in the previous paragraph, it would have been necessary to conduct research in Madagascar in order to identify any local alternatives which currently exist, to make workable recommendations for the establishment of local alternatives, and to explain how investors in Madagascar can access alternatives on an international level. However. I have not had the opportunity to conduct in country research. As a result, two limitations on the subject matter need to be identified at the outset.

I must, nevertheless, make a parenthetical comment at this point. I conducted research in Madagascar in June in connection with another USAID project. That research gave me a general overview of the state of Madagascar's legal system and of some of the major legal problems affecting the private sector. I shall, therefore. take the liberty to include observations made during that project where they are relevant to the issues king considered here

The first limitation on the scope of this paper which needs to be idenrified is that it will concern itself exclusively with arbitration. This is so because the other methods of alternative dispute resolution occur mostly on a local level. These alternatives are, *inter alia*, mediation, conciliation. and negotiation. They are nor discussed here because they are methods that are generally used in well developed legal systems to help the parties come to an agreement amongst themselves in order to avoid the harsher and more expensive alternative of binding arbitration or, in the worse case scenario, litigation in the courts. Since they seem to depend on the cxistcncc of a legal system of binding alternatives such as arbitration or litigation, they are of lesser significance in the immediate future in Madagascar where the problem. as identified above, is the very lack of such binding alternatives.

This is not to suggest, however, that no attention or effort should be devoted to the teaching of these skills in the immediate future. It would be desirable to provide training to the Malagache which would allow them to become familiar with these methods as they are constructing an effective legal system. It is certainly desirable to teach those who might use a legal system the most advance techniques available in developed systems which strive to prevent the formal court system from becoming overburdened.'

However. since I have not had the opportunity to assess the feasibility of such an endeavor on a local level, and, more importantly, since arbitration is a binding alternative in a situation where the other binding alternative (the courts) is essentially unavailable, international commercial arbitration has been chosen as the focus of this paper.

" Some sources dealing with alternative dispute resolution other than arbitration have been cited in the bibliography for this purpose.

The second limitation which I must mention is that this paper shall address almost exclusively the alternative of *international* arbitration. However, as will be seen as this topic unfolds, there is a good deal of overlap between alternatives which can be used on an international and local level at least in the field of arbitration. Even the best known international commercial arbitration institutions and the best known codes of rules relating to international commercial arbitration differ considerably in drawing the distinction.

The International Chamber of Commerce, (hereinafter the ICC) for example, is a well-known international arbitration institution. (See description of the institution below.) Its rules limit its jurisdiction to "international arbitration." However, it defines international arbitration as involving a dispute which contains a foreign element even if the parties are nationals of the same country.' However, under the European Convention which provides a set of rules for arbitration for its members, the definition is narrower. International arbitration is considered to be one involving physical or legal persons having their habitual place of business in differing states.[3] Finally, the Model Law proposed by the United Nations Commission on International Trade Law,(hereinafter UNCITRAL) provides a definition similar to that of the ICC but of potentially even broader scope."

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[2] Hunter and Redfern, *Law and Practice of international Arbitration*, 2nd edition, Sweet and Maxwell, London. 1991, page 15.

[3] European Convention of 1961, Art. I. 1(a).

The Model Law on International Commercial Arbitration states in Article 1(3):

"An arbitration is international if:
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States:
or
(b)one of the following places is situated outside the State in which the parties have their place of business:
(i) the place of arbitration if determined in, or pursuant to. the arbitration agreement:

The significance of this definitional issue regarding international arbitration is that. given the range of institutions and rules which investors in Madagascar may choose. they have access to "international" arbitration in a potentially broad category of disputes.

Consequently, this study is intended to act as a guide to interested parties in Madagascar to the choices of institutions and rules of arbitration which are available on an international level. It will provide information concerning choices of forum and of the type of arbitration and the choice of law including an analysis of the choice of procedural rules to govern the proceedings and the choice of enforcement provisions. While the bulk of this paper will bc devoted to a discussion of international commercial arbitration for the reasons discussed above. Section IV will nonetheless discuss rules for domestic arbitration and will also briefly set out a range of sets of local rules governing international arbitration.

Rules for domestic arbitration would bc ideal, of course, in Madagascar since they would allow for arbitration of any kind of dispute, not only commercial, and would be available in cases where no foreign interests were involved. The major problem in the short term in connection with rules for domestic arbitration is that they of necessity depend upon the enforcement power of local courts. They are nevertheless provided in support of long term recommendations. Where domestic rules are discussed, France has been chosen as the model since the Malgache system is based on the French legal system, and France is probably the first place that they will therefore want to look when they set down to the task of adopting similar rules.

(ii) any place where a substantial part of the obligations of the commercial relationship is to he performed or the place with which the subject-matter of the dispute is most closely connected:

or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

This information is provided in order to aid the Malgaches in making decisions on these issues when the time is appropriate for them to actually adopt laws governing these subjects. Finally. in the conclusion section, recommendations will be made for both long and short term reform in Madagascar.

II. ISSUES ARISING IN INTERNATIONAL ARBITRATION

A. CHOICE OF PLACE AND TYPE OF ARBITRATION.

The choice of the place and the type of arbitration are considered together here because they are related to a large extent. In general, the parties can decide upon the place of arbitration in the underlying contract, but in more cases than not this is not done.' Where a place has not been designated in the underlying contract, then the determination of the place of the arbitration will depend, at least in part, on whether the parties have chosen an "administered" or an ad hoc arbitration. [6] Where the parties have chosen an institutional arbitration and have failed to specify the seat of the arbitration, the institution will decide upon the seat for the arbitration. (See discussion below of the tasks typically performed by the institution in an "administered"

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[5] See Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications, London, 1984, Part III, Section 12.01.

[6] *Id.*

arbitration.)[7]

The place of the arbitration can be important for many different **reasons.** The choice of the place will involve a consideration of the convenience and expense of the parties and of certain procedural **concerns** such as the availability of local courts to resolve difficult procedural issues which may arise in the course of the arbitration.[8] Information concerning these considerations is provided below dealing with procedural issues and **in** the section dealing with enforcement.

1. Institutional and ad hoc arbitration.

Consequently, the choice between an administered or institutional and an ad hoc arbitration is important for this and other reasons.

An "administered" arbitration is one which is conducted by a well known international commercial arbitration institution which will provide the facilities. the arbitrators, the expertise, and a set of rules for the conduct of the arbitration. Usually, the parties designate a particular institution in their original agreement although they may agree **upon** an institution later. Examples of such international institutions are the ICC and the International Centre for the Settetment of Investment Disputes of the World Bank (hereinafter the ICSID.)[9] To cite an example of the services provided by such an institution, Redfern and Hunter in their text, *International*

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[7] *Id.* In that section the authors describe that under the ICC rules this choice is then made by the institution with an eye to the convenience and expense of the par-tics.

[8] *Id.*

[9] See section on history and description of international arbitration institutions below.

Commercial Arbitration, list some of rhe tasks performed by the ICC. They point out that rhe ICC has an arbitration court which

> "--decides whether or not there is prima facie a binding arbitration agreement, under which it is empowered to act;
> --if the parties have not agreed on the number of arbitrators. it decides whether there should be one or three;
> --appoints, or confirms the appointment of arbitrators in accordance with its rules:
> --deals with the challenge and replacement of arhitrarors;
> --assists the arbitral tribunal in establishing the Terms of Reference:"[10]
> --sets down a basic structure for the delivery by the parties of their written cases, and for the presentation of relevant supporting documents. whilst leaving it to the arbitral tribunal (or the parties') to decide what else is required for the efficient determination of the dispute:
> --determines the place of arbitration, unless agreed upon by the parties.
> --fixes time-limits. including a time-limit for the award of the arbitral tribunal:
> --reviews the arbitral tribunal's award in draft form.
> --deals with costs and administrative expenses, including the determination of the fees and expenses of the arbitral tribunal;
> --may also provide, or help find, suitable rooms for the conduct of meetings and hearings during the course of the arbitration.""

Redfern and Hunter go on to identify four criteria that need to be considered in the choice of an institution in the event that the parties choose an "administered" arbitration. In their view, the institution:

> "must have a set of rules which are both fair and effective: secondly, it must have an experienced and competent staff: thirdly, it must be (and seen to be) wholly independent in the way in which it is established and operated; last, but by no means least, it must be

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[10] "Terms of Reference" arc those terms established by the arbitrators in an "administered" arbitration in order to define the issues to be decided and to deal with certain basic procedural matters. See Craig, Park. and Paulsson, *International Chamber of Commerce Arbitration, supra.* Part I. section 2.03. In the case where the arbitration is ad hoc. these matters arc dealt with in the "submission agreement" or "compromis," to use the French term See also Hunter and Redfern. *Law and Practice of International Arbitration , supra*, page 171.

[11] See Hunter and Redfern. *Law and Practice of International Arbitration , supra*, pages 155 and 156.

able to offer an acceptable assurance of permanence.“”

The other choice is an “ad hoc” arbitration. It occurs when the parties provide for the arbitration themselves and decide themselves on the establishment of the rules which will govern the arbitration. In this case. the original agreement fails to designate an arbitration institution: and the rules are thus decided upon subsequent to the existence of the dispute. The parties themselves are then responsible for the performance of the tasks listed above in connection with institutional arbitration. (appointing arbitrators, fixing time limits, etc., etc.)

Where the choice of an ad hoc arbitration is made consciously, it behooves the parties to the agreement to pay particularly close attention to the arbitration clause of their original agreement. In addition, subsequent to the existence of a dispute, they will need to take care to draft a “submission agreement” or "*compromis*," as it is called in French, which sets out a clear and thorough set of rules to govern the arbitration. It is helpful to note in this connection that there is a fair amount of literature providing advise to parties in the drafting of arbitration clauses and submission agreements.” Parties undertaking those tasks would be well advised to consult these sources.

In any event there are advantages and disadvantages to both institutional and ad hoc arbitration. One advantage of the institutional or administered arbitration is that it provides the party with a ready-made set of rules. saving them the considerable effort. of drafting their own. These institutional rules are drafted by international experts who are aware of the latest developments, and the rules are thus designed to cover as many procedural issues as possible.

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12 *Id.*, page 157.

13 *Id.*, Chapter 3.

Secondly, (and this is an advantage of particular significance for this study), the institution provides a forum for the resolution of procedural disputes which may arise along the way. In ad hoc administration, in the event a procedural dispute cannot he decided in accordance with the rules established by the parties, resort will need to be had to the local courts for this purpose.[14] One French authority aptly describes the advantage of the institutional arbitration:

> "The success [of institutional arbitration] is due notably to one good but simple reason: the effectiveness of an 'administered' arbitration, which seems to he guaranteed by the intervention of a permanent and experienced arbitral institution. It may, at any time. prevent the arbitral procedure from being paralysed or slowed down by bad faith, or by the negligence of a party or of an arbitrator. Its institutional rules of arbitration. like the measures which it may take (appointment, challenge or dismissal of' arbitrators, setting time-limits, decisions on various procedural matters) do much to facilitate the autonomy of arbitration in relation to the controlling structures of the state (the law and national judges.)"[15]

The major disadvantage of the institutional arbitration is its expense. The institution charges for the services it provides. and where parties are experienced and capable to decide upon their own rules, the ad hoc arbitration is a less expensive alternative. Apart from the consideration of expense mentioned above. the main advantage of the ad hoc arbitration is that it can be tailor-made to the situation confronting the parties. This can be an important advantage where the parties know what they want and have experience. This aspect of the ad hoc arbitration offers greater flexibility to the parties than the rules of an institution. It is helpful to note in this respect that, where the parties are not so experienced or where the burden of deciding

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[14] It should be noted that where institutional rules are silent. procedural issues may need to he resolved by the local courts as well. This is less likely in the institutional setting since the institutional rules are designed to cover most procedural problems.

[15] Hunter and Redfern,See also Hunter and Redfern, *Law and Practice of International Arbitration* , *supra*, page 156.

upon rules is burdensome, there are sets of rules which can be incorporated by reference without assigning the arbitration to an institution. The best known set of rules. effective for this purpose, is the UNCITRAL Rules mentioned above and the UNCITRAL Model Law mentioned below. In addition. the parties will want to determine whether their arbitration will be subject to the enforcement provisions of the New York Convention or the Geneva Conventions of 1923 and 1927. Incorporating an institution's rules in an ad hoc arbitration is not advisable since the rules often make reference to the institution in such a way as to make the rules unworkable in an ad hoc situation. [16]

The major disadvantage to the ad hoc arbitration is the fact that it depends too heavily on the co-operation of the parties. Where the parties reach a stalemate during the course of the arbitration proceedings. they will have to have recourse to local courts to resolve their differences. This disadvantage makes ad hoc arbitration significantly less appealing in the short term in Madagascar where there is a pervasive lack of confidence in the local courts on the part of the private sector. Perhaps. in the future. with the development and strengthening of the courts (particularly with respect to their enforcement powers), ad hoc arbitration can become a more tempting alternative.

2. Brief History of the Major Institutions and Sets of Rules Available Internationally.

In addition to considering the issues discussed in the previous section. investors and others in Madagascar wishing to take advantage of the alternative of binding arbitration will need to

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[16] *Ibid.*, page 56.

know some basic information about the major international institutions offering institutional arbitration and about the sets of rules for arbitration which are available in the international arena.

It is fair to say that international arbitration arose originally as a method of resolving disputes between states. It was first recognized in the Convention for the Pacific Settlement of International Disputes drawn up at the Hague in 1899." It created the "Permanent Court of Arbitration," (hereinafter the PCA) which is. in fact, not a court in the way in which we usually think of that term but is actually the first international arbitration institution. In its early stages it functioned under the auspices of the Permanent Court of international Justice of the -former League of Nations and today functions under the International Court of Justice of the United Nations (ICJ). As stated. its original function was to allow states who were members of the Hague Conventions of 1899 and of 1907 to voluntarily submit their disputes to binding arbitration at the PCA. However, in 1962, the PCA changed its rules to allow for arbitrations between a state and a private patty on condition that the state become a member of the above mentioned conventions if it wasn't already. This institution. while offering relatively inexpensive facilities and services, is very rarely used. The reasons for this arc not entirely clear.[18]

The institution which is most frequently used in arbitrations involving disputes between a state and a private party is the ICSID of the World Bank. It was established by the Washington Convention of 1965 which was adopted by member states of the Bank.'" The

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17 *Ibid.*, page 42.

18 *Ibid.*, page 46.

19 *Ibid.*, page 47.

ICSID is a facility which is located at rhe Bank in Washington D.C.. and the rules which govern its arbitrations are contained in the Washington Convention. Under its rules, its proceedings are entirely self-contained or "delocalized" to use the term which has arisen in connection with the debatc over whether the proceedings should be exclusively under the control of the arbitration institution or whether they should be subject to the control of the local courts--the courts of the placc where the arbitration occurs. (See discussion below in the section dealing with this debate.) This means that member states of the Convention agree in adopting the convention to relinquish any control which their local courts might have over such arbitrations. There are three conditions which must be met in order for the parties to be able to avail themselves of this institution. "The parties must have agreed to submit their dispute to ICSID; the dispute must be between a contracting state (or one of its subdivisions or agencies) and a national of *another* contracting state; and it must be a legal dispute arising directly out of an investment." [20]

Madagascar is a member of the Convention." Therefore, potential investors there may avail themselves of this opportunity for binding arbitration, assuming that the other conditions for its use are met. The fact that the proceedings under the Convention are self contained is a plus for Madagascar since, as noted, its courts can not be relied upon for this purpose. This would mean then that for disputes involving a state and a private party otherwise eligible for the services of the ICSID. either the parties or the institution could decidc to conduct thc arbitration in Madagascar without any concern about the ineffectiveness of the local courts with respect to supervision or enforcement of the arbitration. In that sense the arbitration system can take the

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[20] *Id.* See Article 25 (1) of the Washington Convention

[21] *Ibid.*, Appendix 23. page 813.

place of the courts. In the short term, while the court system in Madagascar is developing, this is a desirable feature of the ICSID.

Moreover, it should be noted that the ICSID has an additional facility which can be used where one of the parties is not a member state or a national of a member state. In that case, the rules of the Washington Convention do not apply (because the conditions stated above are not met) and therefore national law and local courts must be relied upon. For this reason the ICSID Rules require that the arbitration take place in a country which adheres to the New York Convention.[22](Madagascar is a member of this Convention as well.[23]) While there would be a disadvantage in this case in that local courts could not be relied upon to resolve disputes (not covered by the ICSID Arbitration Additional Facility Rules) which might arise during the course of the arbitration, this disadvantage could be overcome if the parties stipulated that authority should be granted to the ICSID for the purposes of this arbitration.

For a consideration of enforcement of an arbitral award in Madagascar, which is a pervasive problem in any arbitration involving Madagascar, given the inefficacy of its courts, see the discussion below of rules and procedures for enforcement.

While international arbitration between private parties began later than arbitration between states or between a state and a private party, since 1923, there has been significant development of rules and institutions dealing with this kind of arbitration. The first development in this arena was the Geneva Protocol of 1923.[24] The purpose of the Protocol was twofold. Its first goal

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22 ICSID Arbitration (Additional Facility) Rules, Art. 20.

23 Hunter and Redfern. *Law and Practice of International Arbitration*, *supra*, Appendix 23. page 813.

24 *Ibid*, page 61.

was to render arbitration clauses between private parties enforceable on an international level. The second goal was to render arbitration awards enforceable in the territory where the award was made.[25] The Geneva Convention of 1927 went even further and made arbitration awards enforceable in all of the member states of the Convention.'"

However, without any doubt the most important international convention in this connection is the New York Convention of 1958. Under the Geneva Convention of 1927 there had formerly been an important procedural obstacle for enforcement which was known as the "problem of double exequatur."[27] This problem lay in the fact that enforceability of an award in one country would have to be formally established in that country's courts before the award could become formally enforceable in another country. The New York Convention vastly simplifies the procedure and makes awards directly enforceable in any member state. Moreover, it added the feature of requiring the courts of member states to refuse litigation of disputes subject to an arbitration agreement in the event that one of the parties raises this objection." For these reasons, the New York Convention has done more than any other to establish uniform recognition and enforcement of arbitral awards among the member states. (See also the discussion of enforcement considerations below.)

Also in 1923, the ICC, which is perhaps the most important institution of international

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25 Id.

26 *Ibid,* page 62.

27 *Id.*

28 *Ibid.,* page 63.

commercial arbitration, established its Court of Arbitration in Paris.[29] Over the years, it has provided facilities and expertise in the area of international commercial arbitration as described above and has developed a very complete set of rules for arbitrations conducted under its jurisdiction. In more recent years the United Nations has adopted recommended rules in the form of the UNCITRAL Rules for Arbitration (1976)[30] and the UNCITRAL Model Law of 1985.[31]

In summary, while this description and history of the various institutions and rules for international commercial arbitration is far from exhaustive, it does set out the most relevant choices regarding the types of arbitration available to investors and others in Madagascar.

B. CHOICE OF LAW.

The problems which arise in connection with the choice of law constitute one of the most difficult and complicated aspects of international commercial arbitration. Redfern and Hunter comment on this aspect in their text on International Commercial Arbitration as follows:

> In truth, any international commercial arbitration is a forensic minefield. During its course, as many as five or six different national systems of law, or legal rules, may come into play. It would bc too much to expect that there will bc not material difference between them. On the contrary, the potential for conflict is great--whether it concerns the capacity to arbitrate, time limits for commencing proceedings, interest on awards or some

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29 *Ibid.*. page 15.

30 Holtzman and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer Law and Taxation Publishers, Boston, 1989, page *v* [Foreward].

31 *Id.*

other aspect of the arbitral process.

What are these different legal systems, or legal rules, which may impact upon the international arbitral process'? It is possible, with undue sophistication. to list at least five which may arise in practice:

> --the law governing the parties' capacity to enter into an arbitration agreement;
> --the law governing the arbitration agreement and the performance of that agreement:
> --the law governing the existence and proceedings of the arbitral tribunal--the "curia1 law" of the arbitration. or in a better phrase, the *lex arbitri;*
> --the law, or the relevant legal rules, governing the substantive issues in dispute--the "proper law of the contract" as it is known;
> --the law governing recognition and enforcement of' the award (which may. in practice, prove to be not one law, but two or rnore, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to havc assets). [footnotes omitted[32]

In general. the parties are free to choose the law which will apply to these five categories. In the absence of agreement, traditional conflicts of law rules will be applied. In that case. for example, the law governing the arbitration agreement will be governed by the law of the country where the agreement was made. The law governing the underlying contract will be governed by the law where it was made, and the law governing the arbitration proceedings will he governed by the lex arbitri, etc.. etc. Furthermore, nations may wish to impose certain public policy constraints on arbitrations which occur within its borders. For example, a nation may adopt a law providing specific requirements for the admission of evidence or a law limiting arbitrators' authority for arbitrations which occur within its borders. In that case, the *lex arbitri* controls in spite of the agreement of the parties to the contrary. It also controls over any other set of international rules of arbitration (such as those of the ICC or the UNCITRAL Rules. for example.)[33]

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[32] Hunter and Redfern. *Law and Practice of International Arbitration* . *supra*. page 72

[33] *Ibid*.. page 443.

In light of the fact that this aspect of international arbitration is so complex, it is interesting to note that there is a clearly recognizable trend toward "delocalization" of the law in the area of international arbitration.[34] This refers to the fact that increasingly authority is being given in connection with these legal rules to give all of the authority to the international arbitral tribunal to the exclusion of national legal systems. This is the case, for example, in arbitrations before the ICSID, where member states of the Washington Convention have agreed not to impose any constraint on the rules through the application of national law. (See discussion, below.)

This development has given rise to a considerable international debate on this issue. This section will describe the problems that arise in connection with &localization while commenting on the debate in this area, identify the major procedural differences in the sets of rules which are available in the international arena, and provide information on enforcement under international conventions. The goal here is to provide parties in Madagascar with some of the basic information that they will need in order to make these complex choices.

I. Problems arising with delocalization and the related debate.

The problems which arise in connection with the trend toward delocalization and the debate which has arisen around them can be described fairly succinctly. Concomitant with the tendency toward delocalization, there has been an increased tendency for nations to grant

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[34] Park, "National Law and Commercial Justice:Safeguarding Procedural Integrity in International Arbitration," *Tulane Law Review*, vol. 63, number 3, 1989, page 648 at page 650

arbitrators the authority to actually create legal rules where either legal rules are lacking or fairness and equity would require. This has always been possible in civil law countries, such as France. where parties may give arbitrators the authority to act as "*amiable compositeur*," which means that they have such rule-making authority." This is also possible under the UNCITRAL Rules and the UNCITRAL Model Law.[36] Under these circumstances arbitrators will frequently apply their own rules in the interest of fairness or will look to international commercial practices or trade usages (referred to as *lex mercatoria.*)[37]

The main objection to this tendency **relates to a concern** for legal **certainty. This** concern is aptly expressed. as follows, by Prof. William Park in his article entitled, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration":

> "Decisions that ignore legal rules are unlikely to provide the predictability that business managers seek in planning strategy, evaluating risks, and making commercial choices. Nor is dispute resolution according to nonlegal criteria likely to be any more successful than legal rules in bringing community standards to bear on the allocation of **values** and resources that affect third parties. The losing party in an arbitration in which rules are ignored may have less of a feeling that similar cases **have been treated in a similar** manner than when the decisions are made according to legal rules. Decisions according to "fairness" and "*equité*" rather than rules may appear as an excuse for results that are arbitrary and capricious.""[38]

Apart from the substantive concerns relating to legal certainty. there arc procedural concerns which arise as well from the trend toward delocalization. Under a law adopted in Belgium, for example. the arbitral tribunal has been given so much autonomy that it is

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35 *Ibid.* page 648.

36 UNCITRAL Rules Art. 33(2); UNCITRAL Model Law, Art. 28(3).

37 Park. *Tulane Law Review. supra.* page 654.

38 *Ibid.* 662-3.

questionable that even such egregious procedural irregularities such as corruption on the part of the arbitrator can be challenged in Belgian courts.[39] The main objection to this trend is that it will undoubtedly lead to arguably unnecessary litigation in another country where the losing party may have to prove the procedural irregularity in the courts of that nation in order to move against the assets of the other party which are located in that country. In addition, in a country, like Belgium, where review is barred, this trend is unjust to the losing party who has no opportunity to challenge unfair procedural practices.[40]

On the other side of the debate are those who point to the speed. economy, and finality involved in autonomous arbitral justice." Nevertheless. there is a middle ground in the debate. As Prof. Park points out:

> "Modern arbitration statutes exclude, or permit exclusion of. review of the merits of a dispute. while granting a right of review to insure procedural fairness. This required review extends to matters such as the proper constitution of the arbitral tribunal. the arbitrator's respect for the terms of his mission, and the absence of corruption."[42]

Currently in Maclagascar. the debate is superfluous since there is no law relating to arbitration. In addition, given the fact that the courts could not currently provide the protection afforded by local intervention. the autonomy of the arbitral tribunal is necessary so that the arbitral tribunal can work effectively in place of the courts in this arena. However, in the longer

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[39] Law of March 27. 1985 (Belg.), enacting CODE JUDICIARE art. 1717. See also Park, *Tulane Law Review*, *supra*, p. 652.

[40] *Ibid.* 652-3.

[41] *Id.*

[42] *Ibid.*, page 655.

terms, as Madagascar undertakes reforms to strengthen its courts, the Malagache legislature will want to be aware to this debate in order that it might make an informed choice in this area.

2. The differing rules governing international commercial arbitration.

One of the factors, among the others discussed above. which undoubtedly needs to bc considered in deciding on the choice of an institution or a set of rules or a combination of the two is the effect that choice will have on the issue of which procedural rules will actually govern the arbitration proceedings. In order to provide the necessary information concerning this factor this section will examine some of the procedural issues which arise typically in international commercial arbitration and explain how those issues are handled by the ICC and the ICSID and under the UNCITRAL rules.

These rules are chosen simply because they are among the most commonly used. There are, however. numerous other sets of procedural rules. There are other international arbitration institutions which have such rules in addition to the fact that national law sometimes imposes its own rules. Certain procedural issues may arise under international conventions such as the Geneva Convention of 1927 or the New York Convention of 1958.

Similarly, since there is an almost endless list of the various procedural issues which can arise under ICC, the ICSID, and the UNCITRAL rules. (Note that the Hunter and Redfern text, cited in the bibliography, contains an exhaustive treatment of these issues) the discussion in this section will be limited to those procedural areas where the rules differ.

One of the first procedural areas where these rules differ is that which concerns the establishment and organization of the arbitral tribunal. The first issue which arises in this context is the question as to when the arbitration can be considered to have been commenced.

The issue as to when the arbitration is considered to have been commenced is important in that the underlying contract may establish a deadline for the commencement of arbitration. In addition, there may be a statutory requirement under national law for the commencement of the arbitration. In that case, the national law may define the commencement of the arbitration differently. Where the national law is different on that issue, as it is under English law. for example, the definition under national law controls.[43] However, national laws may actually refer to the rules of the arbitral institution, and in that case the institutional rule will govern the determination of when the arbitration shall be deemed to have commenced.;'

The ICC rules state: "The date when the Request for Arbitration is received by the Secretariat of the Court shall, for all purposes, be deemed to be the date of commencement of the arbi tral proceedings. "[45] In general, it can be stated that this commencement is earlier than that which is provided under some national statutory schemes or under the ICSID Arbitration Rules. Those rules provide that an arbitration is not considered to have been commenced until all the parties have been notified that all ot the arbitrators have accepted their appointment.[46]

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43 Hunter and Redfern, *Law and Practice of International Arbitration* , *supra*, page 198.

44 Id.

45 ICC Rules, Art. 3.1

46 ICSID Arbitration Rules, Rule 6(1)

It is interesting to note in this regard that the ICC rule referred to above requires that the request contain information concerning the party's view as to the number and choice of arbitrators. The ICC then serves the request on the other party or parties who then will have an opportunity to provide their view on the subject:" This fact is noted to point out the fact that the issue of fairness to the opposing party in having a say with respect to the number and choice of arbitrators is addressed under the ICC rules even if the arbitration is deemed to have commenced before that happens.

This is an issue with respect to which the legislature in Madagascar may want to take a stand in the long term. In the meanwhile choices of arbitral institutions or of rules for arbitration will need to be made with an eye to this and all of the other issues delineated in this section. The institutional rules also differ considerably with respect to the number of arbitrators to be chosen. The issue is dealt. with in the ICC Rules, Art. 2.5. That rule states that a sole arbitrator will be appointed unless, in the view of the institution, the dispute warrants the appointment of three arbitrators. In contrast, the UNCITRAL Rules and the Model Law provide for the appointment of three arbitrators unless the parties have previously agreed otherwise."

Both rules have their pros and cons. A sole arbitrator is indeed less expensive, and this will often be the deciding factor in the choice of an institution or a set of institutional rules. On the other hand, especially in the case of complex arbitrations, an excessive burden may be placed on the sole arbitrator. In addition, where there are three arbitrators, it is often the case that each party will have the opportunity to name one, and the institution will name the third. For some

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47 Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*. page 197.

48 UNCITRAL Arbitration Rules, Art. 5. Model Law, Art. 10(2).

parties, there is an increased assurance of objectivity with this arrangement. Furthermore, for parties coming from the civil law system, there is a preference for three arbitrators since ordinary courts in civil law countries, as opposed to common law countries, are often composed of' three judges. It is very likely therefore that in arbitrations involving French and Malagache parties, this preference will be encountered since both the French and Malagache legal systems are of the civil law tradition.

Furthermore. apart from the issue of the number of arbitrators to be selected, the process for their selection differs from one set of rules to another. In connection with this issue. it is necessary to state at the outset that the parties always have the right to choose the arbitrators. It is preferable that this choice be made after a dispute has arisen, since in the case where individual arbitrators are named in a contract. they may not be available or appropriate as choices when a dispute actually arises.[49] In addition, there is no formal procedure for the parties to follow in making their choice, and this task is usually accomplished through communication and negotiation between the parties.

It is only where the parties fail to make a choice that the rules come into play. Under the ICC Rules. an arbitrator will be appointed if the parties have failed to appoint one within thirty days from the time when the Request for Arbitration is communicated by the ICC to the other party (as explained above.) The rule is the same in the case where the ICC decides that three arbitrators are necessary.[50]

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[49] See Hunter and Redfern, *Law and Practice of International Arbitration* , *supra*, page 208.

[50] ICC Rules, Arts. 2.3 and 2.4. Also, it should be noted that even where an institution's rules or facilities are not being used by the parties often they will assume the role of finding and appointing arbitrators for a fee. This is done by both the ICC and the ICSID. See Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*, page 210.

The UNCITRAL Rules provide for appointment of arbitrators using a list system. Since UNCITRAL is not an institution but a set of rules, an "appointing authority" must he found for this purpose. According to the procedure established in these rules, the appointing authority must send both parties identical lists. A list of at least three names per arbitrator to he appointed are given. The parties then have the right to exclude any one of the candidates. and they must list their order of preference with respect to the remaining one. The appointing authority then chooses the arbitrators according to the parties' choices."

The UNCITRAL Rules and as well as some of the other systems of rules provide for appointment of a third arbitrator by existing arbitrators where the parties have been able to agree on two arbitrators already.[52]

Another set of issues which arises early on in the process of establishing and organizing arbitrations concerns the independence and impartiality of the arbitrators. There is almost virtual unanimity amongst the various rules in terms of requiring both. There is more difference in the way in which they give rise to the right to challenge an arbitrator and in the procedures available for such a challenge.

Under the ICC rules, an arbitrator may he so challenged at any time during the proceedings, and at that point the Court of Arbitration of the ICC shall make the final binding decision.'- Under the UNCITRAL Rules, a party must raise a challenge within 15 days of the establishment of the tribunal or within 1 5 days of becoming aware of the facts underlying the

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5: *Id.*

52 *Ibid.*, page 211

53 ICC Rules 2.7 and 2.8. See Discussion in Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration*, Part III, Section 13.01.

challenge. The "appointing authority" (See discussion above) is then given the power of final decision on the issue.[54]

The Washington Convention, which governs ICSID arbitrations, contains strict provisions which, in addition to providing for challenge for reasons of lack independence or impartiality, sets out rules of ineligibility of arbitrators based on their nationality.[55] Otherwise, the procedure is similar in that the challenge must be made during the course of the proceeding, and the Chairman of the Administrative Council of the ICSID decides.[56]

It is appropriate to recall at this juncture that, as noted above, often national law will allow for court review of such a decision by an international institution or other arbitral authority. National law often gives local courts the authority to review this and other procedural issues. Review can occur either during the course of the proceedings or as a ground for challenging an arbitration award subsequent to the proceedings.

The major difference in the rules with respect to the issue of the fees and costs of arbitration is determined by the type of arbitration involved. In the case of institutional or administered arbitrations the fees and costs are fixed by the institution. In the case of ad hoc arbitrations, the fees and costs are negotiated, preferably in advance by the parties and the arbitrators."

With respect to the establishment of the powers and duties of arbitrators. this is generally

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54 Hunter and Redfern. *Law and Practice of International Arbitration* . *supra*. page 230.

55 *Ibid.* page 231.

56 ICSID Arbitration Rules. Rule 9(3)

57 Hunter and Redfern. *Law and Practice of International Arbitration* . *supra*. pages 248-9.

considered to be the function of the arbitration agreement with respect to which the parties arc free to decide. This is true whether the arbitration is administered or ad hoc. In unanimous fashion, the various sets of rules. recognize this as the general rule[58] while. nonetheless. requiring that various specific powers or specific duties be conferred upon the arbitrators."' The most notable difference between the various sets of rules in this area arises under the UNCITRAL Rules, as noted above. Under those rules, the arbitrator may be conferred the power and the duty to act as *amiable compositeur.*

Moreover, there really is no appreciable difference between the rules in terms of the way in which they deal with the jurisdiction of' the arbitral tribunal. The general rule is that is determined by the agreement of the parties as stated in the submission agreement or *compromis* and in the arbitration clause of the underlying contract. It is also generally held that the arbitral tribunal has broad power to decide upon its own jurisdiction. and this ruling is generally subject to broad powers of review under national law. especially where the arbitrator is challenged for having exceeding the authority granted to him by agreement." Where the rules speak to the issue of jurisdiction, they provide that arbitrators can derive power from an arbitration clause of a contract which has otherwise been found to be null and void."'

Similarly, the general rule with respect to conduct of the arbitral proceedings is that this is another area left largely to be determined by the parties. There is no appreciable difference

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58 See Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*. Chapter 5.

59 *Ibid.* page 262.

60 See. for example. the French Code of Civil Procedure 1981. Art. 1502.3. See also Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*. section 4 of chapter 5.

61 *Ibid*, page 276.

between the rules relating to the handling of experts, the conduct of hearings, written submissions, etc. etc. Nevertheless, it is worth noting that the rules generally require that the parties arrive at q-cement with respect to these issues."

With respect to the award itself, the rules are once again largely in agreement with the exception of the form of the award and the procedures to be followed for its correction. Under the ICC Rules there are no procedures for the correction of an award. This is so because Article 21 of those rules provides for a detailed review of an award by the ICC Court of Arbitration before it becomes final.[63] Under the UNCITRAL Rules parties may request the tribunal to interpret and correct its award within narrow limits."[64] It is under the ICSID Rules where the greatest difference is encountered. Those rules allow for correction not only by the original arbitral tribunal but also by a new tribunal specifically organized for this purpose in the event that the original tribunal can not be reconstituted. This is undoubtedly the result of the fact that, as noted above, proceedings under the ICSID are entirely delocalized and therefore subject only to review by the institution itself."

It should be noted at this juncture that as a general rule challenges to an award may only be made under the national law of the place where the arbitration occurred--the *lex arbitri*--and only where that law allows it."[65] Where such challenges are allowed, the remedy is either

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62 See Hunter and Redfern, *Law and Practice of International Arbitration*, *supra*, Chapter 6.

63 *Ibid.*, page 374.

64 *Ibid.*, page 375.

65 *Id.*

66 *Ibid.*, page 431.

remission to the original arbitral tribunal or annulment by a local court.

An annulment by a local court applying the *lex arbitri* is a devastating result for the winning party in the arbitration since the award will have no effect in that country or in any other country where the winning party might otherwise like to seek enforcement of the award."[67] Under the *lex arbitri* of some countries, the award can be annulled for procedural irregularities[68] or for reasons of public policy. and. in some countries, for other errors of law.""[69]

As will he seen from the discussion which follows in the next section. this scenario differs greatly from that involving enforcement of awards outside of the place where the arbitration has occurred. In that case. the party wishing to challenge the award as a defence to enforcement will be much more limited in the grounds he can raise. The general rule is that errors of law may not be reviewed. (See discussion below.)

3. Enforcement.

Enforcement is considered separately from the procedural issues discussed above for a few reasons. At the same time, it should be noted that it is indeed a very important issue in connection with the choice of law. It is considered separately in this section. at least in part., because it is so important. While it is true that the vast majority of arbitration awards are voluntarily honored in pursuance of the arbitration agreement. there is no replacement for

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67 *Ibid.*, page 447.

68 *Ibid.*, page 441.

69 *Ibid.*, page 443.

enforcement in those rare cases where the losing party to an arbitration refuses to comply with the award. In addition, the rules are generally silent on the issue of enforcement since enforcement can only be executed by the local courts. Consequently. enforcement will take place under the authority of the local law or under an international convention which **requires** enforcement by the local courts.

Enforcement involves moving against assets of the losing party wherever they arc located, and, for that reason, only the local courts can be relied upon for this purpose. The local courts in turn draw their enforcement power from the national law.[70] **The** most startling breakthrough on the international scene in this connection. as noted in the historical section above, was the adoption of the New York Convention of 1958. In general. it provides that an arbitration award. wherever made must be given enforcement by all of the members of the Convention. However, it should be noted that under the Convention, there is a reservation concerning reciprocity. Member states which opt for the reciprocity reservation are required to provide enforcement only to those awards which are made in another contracting state." The UNCITRAL Model Law would require all countries adopting the law to provide enforcement to all arbitral awards wherever made."

Under the New York Convention, the opportunity for challenging an award is extremely limited, and the burden for mounting such a challenge is placed squarely on the party resisting

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70 *Ibid*., page 450.

71 See Article 1(3) of the New York Convention

72 UNCITRAL Model Law, Articles 35 and 36.

enforcement.'. Under the Convention, the party seeking enforcement must submit a copy of the arbitration award and the arbitration agreement to the local court." At that point. the losing party has no authority to raise errors of law," and his grounds for challenging the award as a defence to enforcement are limited to five procedural grounds. They arc: incapacity of the parties or invalidity of the arbitration agreement, denial of a fair hearing, excess of authority or lack of jurisdiction, procedural irregularities, invalid award (the award has not yet become binding or has been set asidej, or lack of arbitrability under local law.

Since Madagascar is a member of the New York Convention, enforcement under the Convention. specific to that country needs to be considered. For arbitrations that are conducted in Madagascar, enforcement there will not be realistic for the reasons discussed repeatedly above. However, since Madagascar is a member of the Convention, an award made there will be enforceable against the assets of a losing party located in any other member country, including those countries which have exercised the reciprocity reservation. Consequently, if the goal in choosing a place to arbitrate is to maximize enforcement possibilities Madagascar is not. to be excluded as a choice. If on the other hand, there is a desire on the part of one of the parties to preserve the maximum number of possibilities to challenge an award, a different country which grants broad powers of review to its local courts should be chosen. It is interesting to note in this regard that in France, the country with whom Madagascar has a great deal of commercial

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[73] Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*. page 453.

[74] See the New York Convention. Art. IV.1.

[75] Hunter and Redfern. *Law and Practice of International Arbitration* , *supra*. page 461.

interaction, opportunities for challenge are very limited'".

III. REVIEW OF DOMESTIC RULES CONCERNING DOMESTIC AND INTERNATIONAL. ARBITRATION.

As discussed in the introductory section of this paper, in the long term it would be ideal if Madagascar were to adopt its own domestic rules for arbitration. This would allow for arbitration in any area of the law and could apply to cases involving disputes where no foreign interests are involved.

For that reason, the rules for domestic arbitration of one country have been set out as a model to guide the Malgaches in the choices which they will need to make in this area. France has been chosen since the Malgache legal system is so closely modeled after the French. In addition. this section briefly discusses some of the issues which arise in connection with the establishment of local rules governing international arbitration. Some of these issues have been alluded to above, but here the rules of a few different countries are provided in order to provide the Malgaches with a range of choices which they can consider when they come to the task of adopting such rules."

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[76] Park, *Tulane Law Review, supra*, page 690.

[77] It should be noted at this juncture that there is also a treaty between France and Madagascar on international commercial arbitration. This treaty became law in France under Decree No. 60-694 of July 19, 1960. While I do not have the text of the treaty. from its title. it would appear to allow for conciliation and arbitration before the specialized French Arbitration Court presumably in cases involving disputes between nationals of the two countries. Given the succession of governments in Madagascar since 1960 and the resulting impact on the applicability of laws. I cannot state whether this treaty is still in force and effect. However. it clearly merits further research which could be fruitful at least in cases involving those two countries.

A. Domestic Arbitration Under French Law.

Domestic arbitration is governed in France by Decree No. 80-354 of May 14. 1980. The terms of the decree have since been integrated into the French Code of Civil Procedure.

Title I of the decree sets out the rules governing arbitration clauses and submission agreements. It contains three chapters. The rules governing arbitration clauses is set out in chapter one, those governing submission agreements in chapter II; and chapter III sets out rules which are common to both.

In French law. as in any system of law governing arbitration, domestic or international, an arbitration can take place only where there is any arbitration clause in the underlying contract between the parties. This clause must be in writing and must appear in the contract or incorporated by reference. It must either designate an arbitrator or arbitrators or establish procedures for their selection. Otherwise, the clause is to be considered null and void. If the parties find themselves in disagreement as to this aspect of the clause, then the president of the "tribunal de grande instance" (trial court)[78]" will designate an arbitrator or arbitrators. if the clause grants that authority. Under article 4 of this decree, the arbitration clause may stipulate that the commercial court "tribunal de commerce"[79] will exercise this authority.

The parties must then establish a submission agreement, called a "compromis" which at the very least determines the subject of the arbitration and again either designates the arbitraror

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[78] This court is roughly the equivalent of the main trail court which would he present on the county level in the American legal system.

[79] The presence of separate specialized commercial courts is a feature whir-h typifies the French legal system and systems which are based in large part on that system. 'These courts in turn practice arbitration in commercial disputes.

or arbitrators or sets out the procedure for their selection. Absent either of these minimal requirements, the agreement or "compromis" will be considered null and void. In addition, it will also be considered to be null and void where an arbitrator specifically designated in the compromis declines the responsibility thus conferred.

Chapter III of the decree sets out the rules which govern the formation of the arbitration tribunal. While both the arbitration clause and the submission agreement can establish conditions for the establishment of the arbitration tribunal, certain rules nonetheless apply. Only a physical person as opposed to a corporation cm act as arbiter, und where a corporation is mistakenly designated then the corporation shall have the authority to organize the arbitration. Where a corporation or a third party is designated the responsibility of organizing the arbitration tribunal, then the party organizing the tribunal will request each party to choose an arbitrator. If an additional arbitrator is necessary, then the organizing party shall select that arbitrator. Where the parties fail to designate an arbitrator, then the organizing party will select the arbitrator or arbitrators.

The arbitration tribunal shall not be considered to be constituted until each of the arbitrators designated accepts the responsibility conferred upon him or her by the parties. It may be recalled from the section on international arbitration, above, that this issue is often decided by local law even in that context. One or more arbitrators can be designated. the only requirement being that there must be an odd number of arbitrators to avoid the possibility of a tie vote. If the parties designate an even number, then either then another arbitrator shall be selected according to the method designated by the parties in their agreement or in the absence of such a procedure, then the additional arbitrator shall he designated by the other arbitrators

Where the other arbitrators fail to designate the additional arbitrator, then the tribunal de grande instance (see above) shall select the other arbitrator. If one the arbitrators believes that he has grounds to recuse himself or herself, then he or she must so inform all of the parties, and all of the parties must accept the arbitrator under those conditions before the arbitration can proceed.

Unless otherwise stipulated by the parties, the authority of the arbitration tribunal shall last no longer than six months. This period can be extended upon agreement of all parties or upon request by one of the parties, by either the "tribunal de grande instance" or the commercial court if that court has been designated under the authority of Article 4, above. The person organizing the arbitration may establish that the arbitration tribunal will only make a proposed award which will be subject to review by a second tribunal if any one of the parties disagreed with the award. In the case where a second tribunal is necessary, the person organizing the tribunal shall select the arbitrators except that the parties in that case will have the right to select a replacement for one of the arbitrators.

Where a court is asked to issue a ruling in connection with the forming of the arbitration tribunal. there is no right of appeal except where, under the authority of Article 4. the court rules that no arbitration can be formed. The appeal shall be from the court which was designated in the arbitration clause. If no court was so designated, then the appeal will lie from the court which has jurisdiction in the place where the arbitration clause stipulates that the arbitration will take place. Where the arbitration clause is totally silent on these points, then venue will be at the place where the defending party resides, and if he or she does not reside in France then, venue will be at the place where the party plaintiff resides.

It should also be noted at this juncture that recourse to the courts on issues pertaining to

arbitration can only be had when it is authorized by the terms of this decree. If one of the parties attempts to bypass the arbitration process either by going to the ordinary courts prior to the formation of an arbitration tribunal or by seeking to have the case heard by a court while the arbitration is ongoing, then the court must declare its lack of jurisdiction. This is one of the features of law which is required by the New York Convention in the context of international arbitration as noted above. It is designed to bolster the credibility and power of arbitration tribunals generally by not allowing courts to second guess them.

Any provision of an agreement between the parties which is directly contrary to the rules set out in the decree is to be considered null and void as contrary to law. Title II of the decree deals with the procedural rules which govern the proceedings once the arbitration panel has been constituted.

The general principle is that the arbitrators can create their own rules and are not required to follow the rules of civil procedure which are applicable in the courts. Nevertheless, there are some basic rules derived from this decree and from the French code of civil procedure which do apply. For example, an arbitrator does have the power to order the parties to produce evidence within their possession. A transcript and a record of the tribunal rulings must be kept. The compromis may designate one of the arbitrators for this purpose, and where the compromis is silent, all of the arbitrators are responsible for keeping such records. The testimony of witnesses is not to be taken under oath.

In addition. in this title. there are rules which govern the authority and responsibility of the arbitrators. Once an arbitrator has accepted his task, he must follow it through to the end. After the establishment of the tribunal, the parties may not request an arbitrator to recuse himself

nor may the arbitrator recuse himself sue sponta except where the cause t'or recusal or abstention arise subsequently. This is an issue where review by the local courts is authorized where disputes arise in this connection.

In general. within the six month delay discussed above. the arbitration must come to an end. The arbitration will be deemed to have come to an end without result if no award is made prior to that date, and the parties can't agree upon an extension. Otherwise. it is up to the arbitrator or arbitrators to set the date for deliberations. In addition, the arbitration can come to an end where one of the arbitrators is recalled by both parties, where one of the arbitrators dies or is otherwise unable to perform his or her functions, one of the arbitrators recuses himself either sua sponte or upon request of one of the parties. These matters are governed generally by articles 369-376 of the Code of Civil Procedure. After the date set for deliberation by the arbitrator or arbitrators. no more requests or observations may be made by the parties except upon request of the arbitration tribunal.

Title IV of the decree deals with the arbitral award. Its terms are fairly simple. The award must contain in writing all of the arguments of the parties and the factors motivating the decision of the tribunal. The decision is arrived at by majority rule. In general, the decision must be in conformity with the relevant substantive law. There is, however, an important exception to this general rule which was discussed above in connection with international arbitration. Where the parties grant the authority to the arbitrators, they can establish their own rules of law and act as "amiable compsitcur." As noted above, this feature, derived from French law. has been adopted under some of the rules for international arbitration and has created controversy.

Under articles 461-464 of the Code of Civil Procedure, the arbitration award may be subject to correction where it can be shown. on rehearing to be the result of error or material omission. Where the arbitration tribunal cannot bc reconstituted to decide this issue. it can be decided by the local court.

Arbitration awards are subject to execution and enforcement under the same conditions as any court order within the jurisdiction.

The subject of appeal from arbitration awards is dealt with in Title IV. In general. the parties may waive their right to appeal in the arbitration clause or in the compromis. Appeal may not be brought where the tribunal acted as "amiable compositeur," except that the parties may stipulate to a right to appeal under these circumstances in which case the Court of Appeals will also act as "amiable compositeur."

III addition. errors of law or fact cannot be raised on appeal. Appeal lies only where reformation of the award is being sought or where the award is claimed to be null and void. Where the award is claimed to be null and void. an appeal will lie even where the parties have stipulated to the contrary. An award can be declared to be null and void where:

1. the arbitrator decided in the absence of an arbitration agreement or in reliance on a void or expired agreement;

2. the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed;

3. the arbitrator decided without complying with the mission conferred upon him;

4. the adversary principle has not been complied with:

5. the recognition is contrary to public policy;

6. the award does not contain the names of the parties or the names and signatures of the arbitrators.

It must be noted here that with the exception of the last clause these provisions are identical to the relevant provisions governing international commercial arbitration. as noted above.

B. Local Rules Governing International Commercial Arbitration

In the section on international commercial arbitration, above, reference was made to the debate centering around "de localization" of the law on international commercial arbitration. The basic issue underlying this debate is the question of the degree of control that should be exercised by the countries where these arbitrations take place. Since this is an issue which Madagascar will ultimately face, a range of solutions is briefly provided, below.

As noted above, the most extreme example of de localization of the law in this connection is the relevant Belgian law. Under Article 1717 of the Code of Judiciaire, adopted on March 27, 1985, courts are granted no rights to review arbitral awards granted by an arbitration where no Belgians are parties to the arbitration. At least in theory, therefore, parties choosing Belgium as their place of arbitration are totally free from the influence of local authorities in the conduct of the arbitration proceedings. Even where a Belgian is a party, challenge is only permitted in very limited circumstances under section 1704 of the code, mentioned above

Prior to 1981, the French law was similar, but subsequent to the controversial Gotaverken case"[80], where the French Court of Appeal found itself without jurisdiction in a controversial case involving Swedish and Libyan interests. As a result of the controversy generated by this case and its results which was considered to by unjust, France tightened its law by adopting Decree No. 81-500 of May 12, 1981. According to that decreed. French courts can annul an international arbitration award where:

1. the arbitrator decided in the absence of an arbitration agreement or in reliance on a void or expired agreement;

2. the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed;

3. the arbitrator decided without complying with the mission conferred upon him;

4. the adversary principle has not been complied with:

5. the recognition is contrary to public policy.

In Switzerland, Article 192 of the Loi Fedcrale sur le droit international prive, (L.D.I.P.) was adopted and came into effect on January 1, 1989. Under that law, the parties are tree to make choices concerning these issues in the arbitration clause. Under that law the parties may choose to have the arbitration be totally autonomous or they may opt for limited procedural review. Litnited review under the law is available in the following 5 cases:

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[80] General Nat'l Maritime Transp. Co. v. Societe Gotaverken Aidenal A.B., Judgment of February 21, 1980, Cour d'Appel, Paris, 1980 REV.ARB. 524.

1. Irregular composition of the arbitral tribunal or incorrect appointment of the sole arbitrator.

2. an erroneous decision by the arbitral tribunal with respect to its own jurisdiction.

3. an award beyond the issues submitted to the arbitrators.

4. failure to respect the principle of equal treatment of the parties or the right to adversarial proceedings.

5. incompatibility of the award with public policy.

Obviously, given the current range of possibilities which exist in various countries currently, Madagascar is going to eventually have to chose a solution even in the area of international arbitration.

IV. CONCLUSIONS AND RECOMMENDATIONS

As can be seen from the scope of the issues considered in this study, the subject of international commercial arbitration is a very broad topic. For this reason, this paper is nothing more than it purports to be--a guide to choices to be made by investors and others residing or doing business in Madagascar who might want to consider international commercial arbitration as a means of resolving a commercial dispute. I would hasten to point out, however. that for any one of those parties who might be drafting an arbitration clause or an arbitration agreement or seeking to enforce an arbitration award already entered granted, I would strongly recommend

further research. There are many voluminous texts dealing with various aspects of international commercial arbitration which deal specifically with these topics, and several of them are cited in the bibliography of this paper. I would further point out in this connection. that I am also enclosing an article in French which deals with the drafting of arbitration clauses in the context of loan recovery." While I considered it a bit too specific for this report. I am enclosing it because while conducting research in June in Madagascar, I found loan recovery to be one of the major problems affecting the private sector there.

In terms of recommendations that can be made, emphasis must be placed on the fact that there is really no replacement for the kind of enforcement power which can be exercised by local courts--seizing assets, etc. For example, while it is undoubtedly helpful that Madagascar is a member of the New York Convention, this fact is of small consolation to the party who would like to move against assets in that country where the local courts cannot be relied upon. For this reason, and in spite of the fact thar the trend toward &localization is resulting in less reliance on intervention by local courts, Madagascar needs nonetheless to take steps in the immediate future to bolster the enforcement power of its courts.

However, apart from this global task of law reform, a task force of Malgache jurists should be identified and asked to consider drafting two proposed laws--one dealing with domestic arbitration and one dealing with international commercial arbitration.

In drafting the law regarding domestic arbitration the drafters will have to assume the eventual empowerment of local courts since they will be necessary for local enforcement.

[A1] Park, *Revue de droit* de *McGill*,"Réglement de Différends Internationaux: L'arbitrage et le recouvrcnient des prêts consentis à des débiteurs étrangers". Vol. 37. 1992. page 376

Nevertheless, using the French model, which should be eminently adaptable, the Malgache jurists should consider all of the issues raised under the French decree as discussed above. One of the most important issues which they will need to consider in this connection is whether local arbitrators should have the authoriry under any circumstance to act as "amiable compositeur." This is an important decision since, were this power to bc granted, local arbitrators would have the power to create their own substantive rules. As noted above, some authorities feet that the result of such a delegation of legislative authority results in a lack of legal certainty, and this may be a negative factor for those wishing to do business in the private sector in Madagascar. On the other hand, there is indeed something to be said for granting broad authority in order to allow arbitrators to make awards in difficult cases. This issue will need to be carefully weighed by Malgache authorities who will be familiar with local realities.

In adctition, there are issues which arise in both the international and domestic contexts which will need to be decided in the drafting of both of these laws. For example, Malgache law will should determine when an arbitration should be deemed to have commenced. While this will be primarily a decision of local law, as noted above, it will have an impact in both contexts and should therefore be covered by both laws. In addition, rules will need to be established governing the qualification and number of arbitrators together with the procedure for their selection. The French law could perhaps serve as a good model in this connection.

In connection with the proposed law on international commercial arbitration, a decision will need to be made in connection with the complex de localization issue. To what extent, presuming the empowerment of the courts in the long term. will the Malgache want to see international awards subject to challenge in the local courts'? Do they want international

arbitrators to be able to act entirely autonomously, or do they want to otter the parties some limited protection as in France? Or do they want to leave this decision up to the parties as in Switzerland? Many sub issues will arise in the this context particularly if it is decided that some local control is desirable. In that event, there will need to be careful consideration of the grounds which might give rise to local review in Madagascar.

Finally, in the meanwhile. it is the sincere hope of the author of this study that for those considering international commercial arbitration, it will offer some guidance in making the basic choices that will need to be made.

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